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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 PETER DELVECCHIA, *et al.*,

8 Plaintiffs,

Case No. 2:19-cv-01322-KJD-NJK

ORDER

9 v.

10 FRONTIER AIRLINES, Inc., *et al.*,

11 Defendants.

12 Presently before the Court are Defendants' Motions to Dismiss and Strike (#6/10/11).
13 Plaintiffs filed responses in opposition (#19/20) to which Defendants replied (#22/23). Also,
14 before the Court is Plaintiffs' Motion to Amend (#39). Defendants filed a response in opposition
15 (#49) to which Plaintiffs replied (#51).

16 I. Background

17 According to the allegations of the amended complaint, Plaintiff Peter DelVecchia
18 ("Peter") and his twelve-year old son, Plaintiff A.D., contracted with Defendant Frontier Airlines
19 to fly from North Carolina to Las Vegas to explore the western United States during Spring
20 Break on or about March 28, 2019. Plaintiff Peter is Caucasian and his son, A.D. is African-
21 American.

22 Accepting the allegations of the complaint as true, as the Court must, Plaintiffs were
23 seated next to each other on the flight. Peter fell asleep with his head resting on the back of the
24 seat in front of him. He was abruptly awakened when Defendant Warren, an employee of
25 Frontier airlines, violently struck him at the base of his neck. The blow was forceful enough to
26 cause a concussion.

27 Defendant Warren then falsely accused Peter of engaging in illegal human trafficking and
28 sexual assault. Based upon the allegations of the complaint, the assault and the accusations were

1 based on Warren's belief that an older white man should not be traveling with a younger black
2 child. Warren had discussed these beliefs with the rest of the flight crew, the other defendants.
3 They concurred in his belief that the situation was "improper" and that Peter showed
4 inappropriate affection to A.D.

5 Warren then forced A.D. to leave his seat and father. He was forced to sit in the rear of
6 the plane where an adult male sat between A.D. and the aisle. The father and the son were not
7 allowed to reunite for the duration of the flight. The captain on the flight, Defendant Shupe, and
8 first officer, Defendant Mullin, condoned and authorized the separation of the Plaintiffs and
9 authorized the calling of the police and FBI to meet the plane when it landed in Las Vegas.

10 In the presence of other passengers that were deplaning, Warren said loudly to Peter "Go
11 on outside, the FBI is waiting for your ass." Previously, Warren had yelled on the plane that
12 Peter had touched his son inappropriately. When Peter protested, Warren said, "Well we're going
13 to have let the police sort that out."

14 Plaintiffs then brought the present action alleging: (1) violations of 42 U.S.C. § 1981; (2)
15 intentional infliction of emotional distress; (3) negligent infliction of emotional distress; (4) false
16 imprisonment; (5) battery and assault against Warren and Frontier; and (6) defamation and false
17 light invasion of privacy against Warren and Frontier. Defendants have moved to dismiss all
18 claims. Plaintiffs have moved to amend the complaint to name the individual flight crew
19 defendants.

20 II. Standard for a Motion to Dismiss and for a Motion to Amend

21 The Court may dismiss a complaint that "fail[s] to state a claim upon which relief can be
22 granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide "a short and plain
23 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Bell
24 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed
25 factual allegations, it demands more than "labels and conclusions or a formulaic recitation of the
26 elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To survive a motion
27 to dismiss, the complaint must provide enough facts to state a plausible claim for relief on its
28 face. Id. at 678.

1 Iqbal laid out a two-step approach to evaluate a motion to dismiss under Rule 12(b)(6).
2 First, the Court accepts as true all well-pleaded factual allegations in the complaint. However,
3 legal conclusion or mere recitations of the elements of a cause of action—supported only by
4 conclusory statements—do not deserve the assumption of truth. Id. at 678. Second, the Court
5 must consider whether the factual allegations in the complaint allege a plausible claim for relief.
6 Id. at 679. A claim is facially plausible when the plaintiff’s complaint alleges facts that allow the
7 court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Id. at
8 678. Further, where the complaint does not permit the court to infer more than the mere
9 possibility of misconduct, the complaint has “alleged—but it has not show[n]—that the pleader is
10 entitled to relief.” Id. at 679 (internal quotation marks omitted). Thus, when the claims in a
11 complaint have not crossed the line from conceivable to plausible, the complaint must be
12 dismissed. Twombly, 550 U.S. at 570.

13 Under Federal Rule of Civil Procedure Rule 15(a), a party may amend the party’s
14 pleadings once as a matter of course at any time before a responsive pleading is served.
15 Otherwise, a party may amend only by leave of court or by written consent of the adverse party,
16 and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). Although Rule
17 15(a) is very liberal, courts may deny a proposed amendment which would be “(1) prejudices the
18 opposing party; (2) is sought in bad faith; (3) produces an undue delay in the litigation; or (4) is
19 futile.” Amerisource Bergen Corp. v. Dialysis West, Inc., 445 F.3d 1132, 1136 (9th Cir. 2006)
20 (quoting Fed. R. Civ. P. 15(a)).

21 III. Analysis

22 A. Claims arising under 42 U.S.C. § 1981

23 42 U.S.C. § 1981 guarantees “[a]ll persons . . . the same right . . . to make and enforce
24 contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). The Civil Rights Act of 1991
25 amended § 1981 to protect “making, performance, modification, and termination of contracts,
26 and the enjoyment of all benefits, privileges, terms and conditions of the contractual
27 relationship.” Id. at § 1981(b); see also Comcast Corp. v. Nat’l Assoc. of African American-
28 Owned Media, No. 18-1171, slip op. at 10 (S.Ct. 2020). Here, Defendants seek dismissal of

1 Plaintiffs' claim asserting that they were never denied "the actual loss of a contract interest."
2 citing Childs v. Boyd Gaming Corp., 2018 WL 4333945 *4 (D. Nev. September 11, 2018).
3 Defendant asserts that since there is no dispute that Plaintiffs purchased airfare, boarded the
4 plane and arrived at their destination Plaintiffs have no claim.

5 However, § 1981(b) protects parties in the "performance" and the "enjoyment of all
6 benefits, privileges, terms and conditions" of the contract. Based on the allegations of the
7 complaint, that Plaintiffs were assaulted, accused of being involved in human and/or sexual
8 trafficking, separated, and reported to the authorities based solely on their race, is enough to
9 satisfy the requirement that Plaintiffs initially plead "that, but for race, [they] would not have
10 suffered the loss of a legally protected right." African American-Owned Media, No. 18-1171 at
11 13. Therefore, Defendants' motion to dismiss this claim is denied.

12 B. Intentional Infliction of Emotional Distress

13 To state a claim for intentional infliction of emotional distress under Nevada law, a
14 plaintiff must allege "(1) extreme and outrageous conduct with either the intention of, or reckless
15 disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme
16 emotional distress, and (3) actual or proximate causation." Welder v. Univ. of S. Nevada, 833
17 F.Supp.2d 1240, 1245 (D. Nev. 2011) (quoting Dillard Dep't Stores, Inc. v. Beckwith, 989 P.2d
18 882, 886 (Nev. 1999)).

19 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of
20 decency and is regarded as utterly intolerable in a civilized community." Maduike v. Agency
21 Rent-A-Car, 953 P.2d 24, 26 (Nev. 1998) (internal quotations omitted). "Extreme and
22 outrageous conduct also may arise from an abuse by the actor of a position, or a relation with the
23 other, which gives him actual or apparent authority over the other, or power to affect his
24 interests." Cehade Refai v. Lazaro, 614 F.Supp.2d 1103, 1122 (D. Nev. 2009) (internal
25 quotations omitted). When considering whether a plaintiff has sufficiently stated a claim upon
26 which relief can be granted, "The court determines whether the defendant's conduct may be
27 regarded as extreme and outrageous so as to permit recovery, but, where reasonable people may
28 differ, the jury [must determine] whether the conduct was extreme and outrageous enough to

1 result in liability.” Id. at 1121. Certainly, at the initial pleading stage, Plaintiffs have met their
2 burden in alleging extreme and outrageous conduct with a disregard for emotional distress,
3 resulting emotional distress and causation. Therefore, the Court denies Defendants’ motion to
4 dismiss this claim.

5 C. Negligent Infliction of Emotional Distress

6 To recover for negligent infliction of emotional distress under Nevada law, Plaintiffs
7 must likewise establish that they either suffered a physical impact or “serious emotional distress”
8 causing physical injury or illness. Barnettler v. Reno Air, Inc., 956 P.2d 1382, 1387 (Nev. 1998)
9 (“We ... hold that, in cases where emotional distress damages are not secondary to physical
10 injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred
11 or, in the absence of physical impact, proof of “serious emotional distress” causing physical
12 injury or illness must be presented.”). Here, Plaintiffs have failed to adduce the necessary
13 allegations of negligence, and a causative link between a physical impact or serious emotional
14 distress and injury. Further, all of Plaintiffs’ factual allegations assert that Defendants’ conduct
15 was intentional. While the Court appreciates that claims may be plead as alternatives, the claim
16 in this instance contains mere mechanical recitations of elements too attenuated from facts.
17 Accordingly, this claim is dismissed with leave to amend.

18 D. Defamation

19 To show defamation a plaintiff must prove four elements: “(1) a false and defamatory
20 statement ...; (2) an unprivileged publication to a third person; (3) fault, amounting to at least
21 negligence; and (4) actual or presumed damages.” Clark Cty. Sch. Dist. v. Virtual Educ.
22 Software, Inc., 213 P.3d 496, 503–04 (Nev. 2009) (quotations and citations omitted).
23 Defendants asserts that the alleged false and defamatory statements are protected because they
24 were privileged communications to law enforcement. See Pope v. Motel 6, 114 P.3d 277, 317-18
25 (Nev. 2005). They are correct. However, Plaintiffs’ amended complaint asserts that the
26 publication was to other passengers, not the police. Accordingly, the Court denies the motion to
27 dismiss the claim for defamation.

1 E. False Light Invasion of Privacy

2 A false light claim may be maintained only where there is some false statement of
3 objective fact and actual malice. Flowers v. Carville, 266 F. Supp. 2d 1245, 1252 (D. Nev.
4 2003). A false light claim differs from a defamation claim because the alleged injury is from
5 mental distress resulting from exposure to public views whereas a defamation claim concerns
6 reputational harm. Id. “Public” disclosure means “that the matter is made public, by
7 communicating it to the public at large, or to so many persons that the matter must be regarded
8 as substantially certain to become one of public knowledge.” Restatement (Second) of Torts §
9 652D cmt. a (1977). The communication “may be oral, written or by any other means,” but it
10 must be “a communication that reaches, or is sure to reach, the public.” Id. “[I]t is not an
11 invasion of the right of privacy, within the rule stated in [§ 652D], to communicate a fact
12 concerning the plaintiff’s private life to a single person or even a small group of persons.” Id.

13 Here, the allegations are that the false light statements were made only in the presence of
14 a small group of passengers. Such a limited group does not meet the requirement of public
15 disclosure. See, e.g., Kuhn v. Acct. Control Tech., Inc., 865 F. Supp. 1443, 1448 (D. Nev. 1994)
16 (publicity requires that the “matter is made public, by communicating it to the public at large, or
17 to so many persons that the matter must be regarded as substantially certain to become one of
18 public knowledge”). In fact, it appears that Defendants’ on-board allegations were only
19 publicized by Plaintiffs or their agents. Accordingly, the Court grants the motion to dismiss the
20 claim for false light invasion of privacy.

21 F. Motion to Strike Punitive Damages

22 Under Nevada law, punitive damages may be “awarded in addition to compensatory
23 damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from
24 engaging in similar conduct.” Siggelkow v. Phoenix Ins. Co., 846 P.2d 303, 304–05 (Nev. 1993).
25 Such damages are available “in an action for the breach of an obligation not arising from
26 contract, where it is proven by clear and convincing evidence that the defendant has been guilty
27 of oppression, fraud or malice, express or implied....” NRS 42.005. “Malice, express or implied,”
28 is defined as “conduct which is intended to injure a person or despicable conduct which is

1 engaged in with a conscious disregard of the rights or safety of others.” NRS 42.001(3).
2 “Conscious disregard,” in turn, “means the knowledge of the probable harmful consequences of
3 a wrongful act and a willful and deliberate failure to act to avoid those consequences.” NRS
4 42.001(1).

5 Based solely on the motion to dismiss and Plaintiffs’ proposed amended complaint,
6 Defendants have not satisfied the Court that Plaintiffs are categorically foreclosed from
7 recovering punitive damages. Plaintiffs’ amended complaint adequately marshals facts to support
8 an award of punitive damages. Therefore, dismissal of Plaintiff’s request for punitive damages
9 would be premature. Defendants may renew their arguments in a future motion. See, e.g., AC
10 Media Grp., LLC v. Sprocket Media, Inc., No. 2:16-cv-02145-APG-GWF, 2017 WL 1458198, at
11 *4 (D. Nev. Apr. 24, 2017) (“Whether the plaintiffs will be able to develop facts to support a
12 punitive damages award by clear and convincing evidence is not suitable for resolution at this
13 stage of the proceedings.”); Mitschke v. Gosal Trucking, LDS., No. 2:14-cv-1099-JCM-VCF,
14 2014 WL 5307950, at *4 (D. Nev. Oct. 16, 2014) (“Because any damages dispute is currently
15 premature, the court will address the issue of damages if and when plaintiff succeeds on any of
16 her remaining claims.”). Accordingly, the motion to strike is denied.

17 G. Motion to Amend

18 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give leave
19 [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has “repeatedly
20 held that ‘a district court should grant leave to amend even if no request to amend the pleading
21 was made, unless it determines that the pleading could not possibly be cured by the allegation of
22 other facts.’ ” Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting Doe v. United
23 States, 58 F.3d 494, 497 (9th Cir. 1995)). Defendant seeks leave to amend the original complaint
24 to name the Doe defendants who were previously unknown. The Court finds no sufficient bar to
25 the proposed amendment. However, the Court notes that failure to find individual liability may
26 result in an award of attorney’s fees to the prevailing party. The motion to amend is granted.

27 IV. Conclusion

28 Accordingly, IT IS HEREBY ORDERED that Plaintiffs’ Motion to Amend (#39) is

1 **GRANTED;**

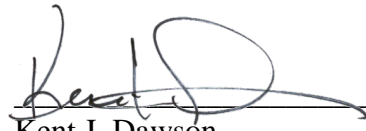
2 IT IS FURTHER ORDERED that Defendants' Motions to Dismiss (#6/10) is

3 **GRANTED in part and DENIED in part;**

4 IT IS FURTHER ORDERED that Plaintiffs' claims for negligent infliction of emotional
5 distress and false light invasion of privacy are **DISMISSED;**

6 IT IS FINALLY ORDERED that Defendants' Motion to Strike (#11) is **DENIED.**

7 Dated this 24th day of March, 2020.

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10 Kent J. Dawson
11 United States District Judge
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